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83-1067

NO.

in the
Supreme Court
of the
United States

October Term, 1982

BILL MADDOX,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS G. MURRAY
Suite 1002
3050 Biscayne Blvd.
Miami, Florida 33137
(305) 573-6622
Counsel For Petitioner

QUESTION PRESENTED FOR REVIEW

Must a Defendant in a criminal trial be forced to demonstrate "Actual Prejudice" when, through the actions of a trial court in denying a defense continuance requested in good faith, that Defendant is forced to stand trial in a lengthy, complex case represented by counsel retained on the morning of trial?

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THE OPINION BELOW

The opinion of the Court of Appeals is not reported, but appears in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 13, 1983. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 28, 1983. On November 25, 1983, Justice Sandra D. O'Connor, Circuit Justice for the Sixth Circuit, entered an order extending the time to file this petition until December 27, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE AND FACTS

On February 18, 1981, the petitioner and twenty-one others were charged in a thirty-count indictment filed in the United States District Court for the Western District of Tennessee, with conspiracy to possess with intent to distribute marijuana, possession with intent to distribute, and distribution of marijuana. The indictment alleged the existence of a network of marijuana distributors operations between Florida and Tennessee.

On August 10, 1981, it was learned that the petitioner and others were indicted in the Southern District of Florida. The petitioner was charged in the Florida indictment with conspiracy to import marijuana and with money laundering.[1]

After hearings on numerous pre-trial matters, trial in the instant case was scheduled to commence on Monday, October 19, 1981. It was learned on Friday, October 16, 1981, however, that the petitioner's retained counsel James Manire, was hospitalized for emergency heart surgery. Manire's young associate, James Reed, requested a continuance of trial, or in the alternative, a severance. This request was denied by the court.

On October 19, 1981, the petitioner's counsel in the Florida case appeared before the court in Memphis, Tennessee to renew the request for a continuance or severance. Counsel stated that he could be prepared within two weeks. It was also reported to the Court that the petitioner specifically objected to being represented by James Reed, who admitted to the Court that, in light of his *total lack of trial experience* he did not feel competent to try the case.

Expressing concern for docket control, the trial court again denied the requested continuance or severance, and presented the petitioner with the choice of being represented by the newly arrived counsel from Miami, or by Mr. Reed. Reluctantly, the petitioner chose to be represented by Miami counsel.

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[1]The petitioner was subsequently acquitted on the conspiracy, and after two Juries were unable to reach a verdict on the money laundering case, the Government dismissed the charge.

After four weeks of trial, during which counsel repeatedly complained of the inadequacy of the time allowed for preparation, the jury found the petitioner guilty on all counts. The Court sentenced the petitioner to ten years each on Counts one and two, the sentences to run concurrently. In addition, the Court imposed fines totalling $90,000. In Counts three through thirty, the Court imposed sentence of five years on each count, concurrent with the sentence imposed in counts one and two. Finally, the Court imposed a special parole term of five years.

On appeal to the United States Court of Appeals for the Sixth Circuit, the petitioner presented, *inter alia*, the following issue:

> WHETHER THE TRIAL COURT'S ACTIONS IN DENYING THE DEFENDANT'S GOOD FAITH REQUEST FOR A CONTINUANCE OR SEVERANCE, THEREBY FORCING THE DEFENDANT TO TRIAL REPRESENTED BY COUNSEL RETAINED LESS THAN ONE DAY BEFORE TRIAL, DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHTS.

The petitioner presented a plethora of cases, including several from this Court, which compelled the conclusion that the petitioner was entitled to a new trial. The Government argued that since the petitioner could point to no specific prejudice as a result of the representation he received, the deprivation of counsel, if any, amounted to harmless error. The appellate court, apparently convinced by the Government's argument,

summarily, and rather cavilierly affirmed the petitioner's conviction. Similar treatment was given to petitioner's request for rehearing and rehearing *en banc*. This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents an issue of the highest constitutional magnitude, and, together with a case already pending before the Court, (*United States v. Cronic*, case no. 82-660) offers the opportunity to fashion standards by which to measure the effectiveness of counsel's assistance at trial, and to "flesh out" the skeletal and often conflicting definition of that Sixth Amendment right. While *Cronic* represented the plight of a criminal, defendant represented by a court-appointed attorney who specialized in real estate law, was unfamiliar with federal practice and had only twenty-five days to prepare his defense, the instance petitioner was, through no fault of his own, forced to proceed to a four-week trial represented by counsel, who, albert experienced, had literally *no* time to prepare a defense. In both cases, it is submitted, the Defendants were deprived of their Sixth Amendment right to counsel.

It is difficult to imagine a principle of law which at this juncture of American jurisprudence is more well settled than the fundamental and essential nature of the Sixth Amendment right to the assistance of counsel. Thus, it has been recognized that counsel is required when the accused is in custody, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); at post-indictment lineups, *United States v. Wade*,

388 U.S. 218 (1967); at certain probable cause or preliminary hearings, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Colelman v. Alabama*, 399 U.S. 1 (1970); at arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961); at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) at sentencing, *Mempa v. Rhay*, 389 128 (1967); on appeal *Douglas v. California*, 372 U.S. 353 (1963); *Entsminger v. Iowa*, 386 U.S. 748 (1967); during juvenile proceedings, *In re Gault* 387 U.S. 1 (1967); *Kent. v United States*, 383 U.S. 541 (1966); while in prison, *Wolff v. McDonnel*, 418 U.S. 539 1974); *Johnson v. Avery*, 393 U.S. 483 (1969); and during parole or probation revocation hearings, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). This Court has stated:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been initiated against him.
>
> *Brewer v. Williams*, 430 U.S. 387, 398 (1977)

Of course, it has long been recognized that the Sixth Amendment entitles a criminal Defendant to more than mere representation; an accused has the right to the *effective* assistance of competent counsel. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). The right to counsel is deemed so fundamental that infringement upon that right short of total deprivation requires reversal. As this Court stated in *United States v. Morrison*, 449 U.S. 361 (1981), interference with one's right to counsel

will warrant reversal so long as it "had or threaten[ed] some adverse effect upon the effectiveness of counsel's representation . . ." Thus, in *Geders v. United States*, 425 U.S. 80 (1976), this Court held that the trial court had committed reversable error in instructing the Defendant, who was on the witness stand, that he could not consult with his attorney during a seventeen hour overnight recess. Similarly, in *Herring v. New York*, 422 U.S. 853 (1975), a deprivation of counsel was recognized and reversal required when counsel was not permitted to give closing argument in a non-jury case.

Certainly, inadequate case preparation can derogate an accused's right to effective assistance of counsel. See *Powell v. Alabama*, *supra*. That is true whether the inadequacy is the result of a slothful or inexperienced lawyer, or, as in the instant case, the result of unreasonable time constraints imposed by the trial court. *See, e.g., United States v. Cronic*, *supra*; *United States v. Golub*, 638 F.2d 185 (10th Cir. 1980); *United States v. Olivas*, 558 F.2d 1366 (10th Cir. 1977).

In the instant case, the petitioner quite reasonably requested a continuance of his trial in light of the fact that his attorney had been admitted to the hospital for emergency heart surgery. The denial of that continuance left the petitioner the Hobson's choice of proceeding to trial represented by a mere neophyte attorney who had no trial experience, or by a more seasoned attorney whose initial appearance in the case was on the morning of trial and who had no knowledge of the facts of the case. A review of the case law compels the conclusion that the trial court acted improperly in denying the petition's requested continuance.

Although rulings on motions for continuance are traditionally left to the discretion of the trial court, "a judge is not imbued with the power to abrogate a criminal Defendant's constitutional rights." *United States of America v. King*, 664 F.2d 1171 (10th Cir. 1981). As noted in *Unger v. Sarafite*, 376 U.S. 575, 589 (1964):

> [A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.

See also United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978); *Linton v. Perini*, 656 F.2d 207 (6th Cir. 1981); *United States v. Johnson*, 318 F.2d 288 (6th Cir. 1963). As this Court forcefully stated in *Powell v. Alabama*:

> It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

Powell v. Alabama, *supra* at 59. Finally, as succinctly stated by the Fourth Circuit, when, as in the case *sub judice*, an attorney is employed one day or less before trial, it is incumbent upon him to request a continuance *and it is incumbent upon the Court to grant it. Stokes v. Peyton*, 437 F.2d 131 (4th Cir. 1970). *See also, Sykes v. Comm. of Virginia ex rel. Peyton*, 364 F.2d 314 (4th Cir. 1966). Given the complexities and sheer magnitude of the trial facing the instant petitioner, it cannot be reasonably argued that the trial court was correct in denying a continuance to the petitioner represented by counsel just off the plane from Miami, who was totally unprepared for trial.

Finally, it should be beyond cavil that the apparent holding of the Sixth Circuit in the instant case to the effect that the petitioner was not prejudiced by the trial court's actions is grossly in error. Without cataloging the substantial prejudice to the petitioner inherent in proceeding to trial in a complex case represented by counsel ignorant of the facts, suffice it to say that even if no prejudice could be demonstrated, reversal would be required. As the Tenth Circuit in *United States v. Cronic*, 675 F.2d 1126, 1128 (10th Cir. 1982) in a case now before this Court:

> [W]hen circumstances hamper a given lawyer's preparation of a Defendant's case, the Defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel . . . This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled be a reasonably diligent

> and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.

In so holding, the Tenth Circuit was merely restating this Court's holding in *Glasser v. United States*, 315 U.S. 60, 76 (1941): "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Any notion that whether a denial of counsel constituted a denial of due process is a question to be tested by an appraisal of the totality of facts in a given case has been laid to rest by *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is now recognized that a deprivation of the right to counsel at trial can never be harmless error:

> Moreover, this Court has concluded that the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman v. California*, 386 U.S. [18] at 27. Accordingly, when a Defendant is deprived of the presence and assistance of his attorney either throughout the prosecution or during a critical state in, at least, the prosecution of a capital offense, reversal is automatic.

Holloway v. Arkansas, 435 U.S. 475, 489 (1978).

Indeed, infringement upon the right to counsel is *presumed* to be prejudicial. As Justice Brennan observed

in his concurring opinion in *Dickey v. Florida*, 398 U.S. 30, 54-55 (1970):

> Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, an impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process. Because potential substantial prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is denied. Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice must be assumed, or constitutional rights will be denied without remedy.

In light of the trial court's actions in unreasonably denying the Defendant's requested continuance or severance, which request was made in good faith and not for the purposes of delaying trial, but which was made only to afford counsel an opportunity to prepare for trial, it is clear that the petitioner has suffered a substantial deprivation of his Sixth Amendment rights and his conviction should be reversed. More importantly from this Court's standpoint, because of the potential broad impact of this case and that of *United States v. Cronic*, *supra*, on the criminal justice system, this Court should grant its writ of certiorari.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinions of the Sixth Circuit.

Respectfully submitted,

THOMAS G. MURRAY
3050 Biscayne Blvd.
Suite 1002
Miami, Florida 33137
(305) 573-6622
Counsel for Petitioner

Appendix

82-5063, 82-5185, 82-5199
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

DONALD E. RAULERSON, DONNIE RAULERSON, and BILL MADDOX

ORDER

BEFORE: EDWARDS, Chief Circuit Judge, ENGEL, Circuit Judge, and BERTELSMAN, District Judge.*

On receipt and consideration of appeals in the above-styled cases and on consideration of the lengthy record of this trial and finding therein more than ample evidence of the defendants' guilt on charges of conspiracy to distribute and distribution of thousands of pounds of marijuana; and finding in this record no improper joinder of separate conspiracies in a single trial, nor any reversible error in the admission of certain tape recordings made in Miami, not any deprivation of counsel in the trial court's denial of continuance or severance to defendant Maddox; and finding further that the evidence in this case as to all three defendants constituted overwhelming support for the jury's guilty verdicts;

Now therefore, the judgments of convictions are affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A TRUE COPY

Attest:
JOHN P. HEHMAN, Clerk
By [illegible]
Deputy Clerk

ISSUED AS MANDATE: OCTOBER 10, 1983
COSTS: NONE

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*Honorable William O. Bertelsman, District Judge, U.S. District Court for the Eastern

No. 82-5185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BILL MADDOX,
Defendant-Appellant.

ORDER

Before: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and BERTELSMAN,* District Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court
/s/ John P. Hehman
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-402

BILL MADDOX,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 27, 1983.

/s/ Sandra D. O'Connor

Associate Justice of the
Supreme Court of the
United States

Dated this 25th day of November, 1983.